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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

Hon. ROBERT M. MORGENTHAU,

Petitioner,

- against -

CLIFFORD RANDALL,

Respondent.

PETITION AND APPENDIX FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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February 19, 1992

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QUESTIONS PRESENTED

1. Whether, in the absence of intentional governmental misconduct, the Double Jeopardy Clause of the United States Constitution bars retrial of a criminal defendant who, on incorrect information, has decided after consultation with counsel to abort his trial and enter a plea of guilty, and who later withdraws that plea?

2. Whether a state court is free to reject the holding of United States v. Tateo, 377 U.S. 463 (1964), in construing the Double Jeopardy Clause of the United States Constitution?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

Hon. ROBERT M. MORGENTHAU,

Petitioner,

- v. -

CLIFFORD RANDALL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable Chief Justice and the Associate Justices of the Supreme Court:

PRELIMINARY STATEMENT

Robert M. Morgenthau, the District Attorney of New York County, State of New York seeks a writ of certiorari to review a November 21, 1991, order of the Court of Appeals of the State of New York.

OPINIONS BELOW

The opinion of the New York Court of Appeals, dated November 21, 1991, concluding that the Double Jeopardy Clause of the United States Constitution prohibited respondent's criminal prosecution is reported at 78 N.Y.2d 494, 577 N.Y.S.2d 211, 583 N.E.2d 924 (Pet. App. 1 - 16). The opinion of the Appellate Division, First Department, of the Supreme Court of the State of New York which granted a petition against further prosecution under New York CPLR article 78 is reported at 161 A.D.2d 70, 560 N.Y.S.2d 409 (Pet. App. 20 - 58).

JURISDICTION

The Order of the Court of Appeals was entered on November 21, 1991. This Court's jurisdiction is being invoked under 28 U.S.C. section 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the United States Constitution, provides, in pertinent part:

> ... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; ....

Amendment XIV, Section 1, of the United States Constitution, provides, in pertinent part:

> ... nor shall any state deprive any person of life, liberty, or property, without due process of law ....

STATEMENT OF THE CASE

A. The Events Leading to the Guilty Plea

Respondent Clifford Randall was charged with attempted murder and other offenses for shooting Edward Warner, Jr., a childhood acquaintance, "seven times with an automatic weapon" (R26, R86).[1] In June, 1989, Randall, represented by counsel, proceeded to a jury trial presided over by Justice Harold Rothwax (R27, R35).

The jury informed the court that it might be deadlocked (R35). Thereafter, at an unrecorded bench colloquy following the jury's dinner, Justice Rothwax informed Randall's attorney that based upon

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[1]Page references preceded by "R" are to the Record on Appeal to the Court of Appeals of the State of New York. Copies can be forwarded to the Court if requested.

"speculation," which the judge thought might be "reliable," the jury could be split ten to two for conviction (R35, see Pet. App. 3).[1] Reminding Randall's attorney that one could not be "sure" of

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[1]In the petition, Randall alleged that the judge "did not indicate how [he] came into possession" of the information (R27). In a motion before the judge to dismiss on double jeopardy grounds, Randall conceded that the judge said the following about the information: "[Y]ou can never know for sure and this was speculation" (R35). The record does not reveal that the judge gave the basis of his information. Nor does it reflect that he was asked to give the basis, and refused to do so. In an account never contradicted by respondent Randall, Justice Rothwax explained, when he later denied a motion to dismiss the indictment based upon double jeopardy grounds that he had asked a court officer "if everything went all right with the jury at dinner" (R77). The officer replied that there were no problems, but observed that, based upon how the jurors interacted with one another, he believed that the jurors "had split into two camps, one group of ten jurors and one group of two jurors" (R78). The "attitude" of the jurors towards each other had given the officer the "sense that the majority were for conviction" (R78).

the "speculation" (R35), the judge asked if a plea bargain might be possible. The attorney, aware of the strength of the evidence that had been presented to the jury, conferred with Randall. Randall decided to enter a plea of guilty to one count of Criminal Use of a Firearm in the First Degree, under the third count of the indictment (R27, see Pet. App. 3-5). This decision was made after the judge convinced the prosecutor to agree to a sentence for this lesser offense that was less than the term the prosecutor had been willing to accept prior to trial (R36).[1]

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[1]The plea of guilty also "covered a violation of probation which was then outstanding against" Randall (R79).

B. The Motion to Withdraw the Guilty Plea and the Motion to Dismiss the Indictment

After the jury was excused, Randall's attorney discovered that the jury had been "split" ten to two for acquittal rather than conviction (R42, R43). Randall moved to withdraw the plea of guilty. He now claimed that Justice Rothwax had "improperly imparted" information to Randall's attorney (R27-R28, R35).

On July 26, 1989, Justice Rothwax, as "an act of discretion," permitted Randall to withdraw his plea of guilty (R46). The judge observed that "[c]ounsel may have been misled, inadvertent to be sure, but misled by the Court nevertheless" (R46). The case was adjourned for Randall to seek new counsel and for a new trial (R47-R50).

New counsel moved to dismiss the indictment, claiming that a retrial would

violate the Double Jeopardy Clause (R51). The essence of the motion was that the judge had engaged in "improper conduct ... in coming into possession, and then passing along, information from a Court officer with regard to the direction and voting" of the deliberating jury (R54). According to Randall, the "improperly passed along" information had "induced" Randall to plead guilty (R54), and he had lost his "right to have a particular tribunal decide his fate" (R57). Randall conceded that he was "not claiming intentional misconduct" (R58); rather, he likened the situation to a decision to plead guilty "under false pretenses" (R58).

On December 5, 1989, Justice Rothwax denied the motion to dismiss. After reviewing the events leading to Randall's

plea of guilty, the judge observed that it had probably been "ill-advised" to communicate what he had heard from the court officer (R81). However, the judge continued, given that the jury had declared itself deadlocked and given that the information had been volunteered by the court officer, the judge had brought it to the attorney's attention "basically to guide him in whatever action he wanted to take, not to produce any particular result" (R81a). Noting that there was no "pressure" by the court to make Randall plead guilty (R81c), nor any allegation of "improper motives" (R81c), the judge denied the motion.

C. The CPLR Article 78 Petition

Randall then brought a proceeding under CPLR article 78 in the Appellate

Division, First Department to prohibit a new trial based "upon Double Jeopardy and Due Process grounds" (R26) under both the "State and Federal Constitutions" (R29). Once again, the premise of the claim was that the judge's improper conduct was in "taking improperly received information from a Court officer and passing it along to the respective parties" (R29). According to Randall, this "set off a series of events that cannot be remedied" (R29).

In answer, respondent Morgenthau conceded the facts as stated by Justice Rothwax in his oral decision of December 5, 1989, denying the motion to dismiss (R87). Noting that "no allegation of malice or bad faith" had been made (R87), respondent Morgenthau argued that United States v. Tateo, 377 U.S. 463 (1964),

required that the petition be dismissed (R90-R92).

D. The Decision of the Appellate Division, First Department

On September 6, 1990, the Appellate Division granted the petition (Pet. App. 17-19). The court viewed the matter as turning on whether Randall's decision to plead guilty had been a "knowing and intelligent waiver of the defendant's right to have his case decided by the first impanelled jury" (Pet. App. 33-34). The court, in turn, observed that that determination rested on whether the decision to plead guilty had been "coerced" (Pet. App. 35). The court then stated that a "review of the record leaves us with no doubt that the defendant's guilty plea was coerced, perhaps inadvertently, but coerced nonetheless"

(Pet. App. 35-36). Finding that there was "every indication that the defendant, satisfied with the way the trial had gone, would have left his case with the jury had the court not led him to believe that his confidence in the jury was seriously misplaced" (Pet. App. 38-39),[1] the court concluded that Randall had been deprived of the opportunity to have the empaneled jury decide his fate (Pet. App. 45).

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[1]The court pointed to nothing that had been alleged by Randall from which the conclusion could be drawn that, at the time of the deliberations, Randall was "satisfied" with the way his trial had gone (Pet. App. 38, 40). In no sworn document had Randall or his attorneys alleged that up to the time of the deliberations the defense had been "satisfied" with the trial. The only suggestion of such came in the supplemental memorandum of law filed by Randall's new attorney in connection with the article 78 petition. Buried in that document, to which the state was not entitled to respond, was the single sentence: "The trial had gone very well" (R101).

The court rejected United States v. Tateo, 377 U.S. 463 (1964), as controlling authority. First, it concluded that it was "difficult to square Tateo with prior decisions of the Supreme Court," including Downum v. United States, 372 U.S. 734 (1963), and Green v. United States, 355 U.S. 184 (1957), "nor ... easy to reconcile Tateo with subsequent Supreme Court doctrine," such as United States v. Dinitz, 424 U.S. 600 (1976), and United States v. Jorn, 400 U.S. 470 (1971) (Pet. App. 46-47). Second, it purported to find a distinction between the threat of the judge in Tateo to increase a sentence, and the misinformation of the instant judge that suggested an acquittal was unlikely. Because the court found the circumstances "so thoroughly eclipsed" Randall's "option to proceed" to verdict (Pet. App. 50), the

court found that Randall's rights under the Double Jeopardy Clauses of the federal and state constitutions had been violated and granted the petition (Pet. App. 58).

E. The Decision of the Court of Appeals

The Court of Appeals affirmed the conclusion of the Appellate Division, but specifically limited its determination to the Double Jeopardy Clause of the federal Constitution (Pet. App. 1). The court concluded that the case was "not controlled by any particular precedent" (Pet. App. 6); rather, it based its conclusion "under elemental double jeopardy principles" (Pet. App. 6). The court emphasized that it was a defendant's "entitle[ment]" to have a "particular jury" decide his fate (Pet. App. 7).

The court held that the judge's "inadvertent error" during deliberations was insufficiently remedied under the Double Jeopardy Clause by a vacatur of the guilty plea because the "particular jury" entitlement was lost to respondent Randall (Pet. App. 7). The court refused to follow United States v. Tateo, 377 U.S. 463 (1964) because it concluded that "subsequent Supreme Court cases cast considerable doubt" on the vitality of Tateo (Pet. App. 11). Rather, the court concluded that a judge's inadvertent mistake which leads to a defendant's decision to abort his own trial is the equivalent of a judge's sua sponte declaration of a mistrial in the absence of manifest necessity over a defendant's objection (Pet. App. 11-12).

REASONS FOR GRANTING THE WRIT

The writ should be granted for two reasons. First, the correctness and continuing vitality of the determination in United States v. Tateo, 377 U.S. 463 (1964), is in judicial dispute, and, therefore, an inequity in the application of Tateo to United States citizens exists. Second, the New York Court of Appeals, an influential court, has demonstrated a fundamental misunderstanding of the Double Jeopardy Clause.

A. The dictates of United States v. Tateo, 377 U.S. 463 (1964), are not being applied equally among United States citizens

Nearly three decades ago, in United States v. Tateo, 377 U.S. 463 (1964), the Court responded to the countervailing policy concerns between society's need to insure that the guilty are punished and a

defendant's desire for adjudication of his or her guilt by a particular group of jurors. There, the Court was faced with a defendant who decided to plead guilty during trial after the federal judge threatened an enhanced sentence if he were to be convicted by the sitting jurors. At that time, the Court found no Double Jeopardy bar to retrial even though the guilty plea was coerced by the judge's conduct. The Court held that, though a plea of guilty may be invalid as coerced if a defendant terminates the trial to plead guilty, the Double Jeopardy Clause does not bar retrial, at least absent willful governmental intent to obtain the plea of guilty to avoid what is perceived otherwise to be an acquittal.

Thirty years later, in the instant matter, the New York Court of Appeals

rested its determination solely and completely on the Double Jeopardy Clause of the United States Constitution. In so doing, it concluded that Tateo is no longer viable precedent. Although a lower New York court tried to distinguish Tateo, New York's highest court candidly recognized that no convincing distinction could be made.[1] Instead, it held that Tateo was no longer viable as continuing precedent because "subsequent ... cases" had "cast considerable doubt" on it. Thus, the only basis for the New York interpretation of the federal Constitution is that Tateo is no longer 'good law.'

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[1]The thin reed on which the lower court in New York seemed to rest was that the New York judge's unintentional error concerned what the likely verdict of the jury would be while the federal judge's purposeful threat did not. New York's highest court did not accept that distinction.

Plainly, the competing policy concerns discussed in Tateo -- society's need to punish the guilty versus a defendant's desire for adjudication by a particular jury -- remain in tension to this day, and this Court's discussion of those policy issues in the Tateo decision are often quoted. As recently as 1988, in Lockhart v. Nelson, 488 U.S. 33 (1988), the language in Tateo was relied upon in the majority and dissenting opinions. 488 U.S. at 34 (Rehnquist, C.J.); 488 U.S. at 42 (Marshall, J., dissenting). And, the Court quoted from Tateo's discussion of society's interest in punishing the guilty just a year earlier. Montana v. Hall, 481 U.S. 400, 402-03 (1987). That the policy tensions persist to this day, however, does not resolve how they should be balanced and whether the balance achieved

in Tateo's holding remains, thirty years later, the correct one.

As pointed out above, Tateo dealt with two competing principles relevant in this area of Double Jeopardy Clause jurisprudence. On the one hand are those cases in which the criminal defendant's "valued right to have his trial completed by a particular tribunal" has been emphasized, Wade v. Hunter, 336 U.S. 684, 689 (1949), and in which the defendant's right to retain control over the course to be followed in the event of prosecutorial or judicial error vis a vis the petit jury has been promoted, United States v. Dinitz, 424 U.S. 600 (1976); United States v. Jorn, 400 U.S. 470 (1971); Downum v. United States, 372 U.S. 734 (1963).

On the other hand are those cases in which the Court has noted society's

important interest in punishing the guilty and the need to avoid having every trial error confer an immunity against retrial. Burks v. United States, 437 U.S. 1 (1978); United States v. Ball, 163 U.S. 662 (1896). The Court has thus observed that a rule entitling the defendant "to go free if the trial fails to end in a final judgment" would:

> create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed .... [A] defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.

Wade v. Hunter, 336 U.S. at 688-689.[1]

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[1]What is of significance here is that, though the jury was leaning towards acquittal rather than conviction, there is no reason to conclude that the jury would

(continued...)

Therefore, the general rule that has been fashioned is that a jury trial terminated prior to verdict at the behest of or with the consent of the defense does not bar retrial. Oregon v. Kennedy, 456 U.S. 667, 672 (1982); United States v. Dinitz, 424 U.S. at 607-610.

Tateo had represented a point at which the tension is poignant -- a defendant who terminates his or her trial as a result of some sort of governmental conduct which makes that course more palatable than risking the jury's verdict. Tateo resolved that tension against the criminal defendant and in favor of the society's interest in a full guilt determination. If the result in Tateo was correct, no different result should have occurred

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[1](...continued)
have ultimately been anything other than deadlocked.

here. With a parallel opportunity to address the competing interests presented nearly three decades ago now before this Court and with citizens now being treated differently in different states, this Court should return to this area of federal Double Jeopardy jurisprudence and resolve whether policy interests call for a revised interpretation of the federal Constitution -- the path that New York has taken.

Certainly, a number of jurisdictions have no problem in accepting Tateo's result, and reject efforts to apply a Double Jeopardy bar in the absence of intentional misconduct designed to avoid an expected acquittal. For example, California recently applied the Tateo result to the improvident discharge of a jury. People v. Moore, 1 Cal.App.4th 546,

2 Cal.Rptr. 2d 231, 1991 Cal.App. LEXIS 1388 (Ct.App. 1991). Likewise, Rhode Island and Arkansas also recently have found no reason to question the Tateo result in the face of claims of prosecutorial misconduct. State of Rhode Island v. Diaz, 521 A.2d 129 (R.I. 1987); Timmons v. State of Arkansas, 290 Ark. 121, 717 S.W.2d 208 (1986).

On the other hand, New York is not the only court to question Tateo, or to conclude that a Double Jeopardy claim may arise in the absence of malevolent intent. At least one federal trial judge has asserted that the holding of Tateo does not survive this Court's later precedent. Scott v. Jones, 688 F.Supp. 510, 518 n.20 (W.D. Mo.), reversed for other reasons, 862 F.2d 1311 (8th Cir. 1988), cert. denied, 490 U.S. 1111 (1989). And, like

New York, Arizona has suggested that even in the absence of malevolent intent, a defendant who perceives that the judge has intimidated him or her to abort a trial might have a valid Double Jeopardy claim. City of Tucson v. Valencia, 21 Ariz. App. 148, ___, 517 P.2d 106, 109 n.5 (1973). Maryland has wrestled with other aspects of Tateo's resolution of the competing policy concerns surrounding pre-verdict trial terminations. See Jones v. State of Maryland, 44 Md.App. 417, 409 A.2d 725 (1979).[1]

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[1]We note that both the Arizona and Maryland discussions took place prior to the Court's 1982 opinion in Oregon v. Kennedy, which states a test of an intent to provoke the defense to terminate the trial, 456 U.S. at 674. In a sense, that statement of the test begs the question in this case. Certainly, here, as in Tateo, the judge intended to convey the information and certainly the motivation might be that the defendant might decide to plea guilty rather than risk a jury

(continued...)

A basic inequity of treatment, based upon a fortuity of geographical presence, therefore exists concerning whether the Double Jeopardy Clause of the United States Constitution prevents the reprosecution of persons who decide to abort their trial under circumstances in the absence of intentional governmental misconduct designed to avoid an acquittal. By concluding that Tateo is no longer 'good law' under the federal Constitution, New York will, under the guise of federal jurisprudence, undercut and eviscerate society's interests in promoting a process

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[1](...continued)
verdict. Arguably, then, there is an intent to provoke a termination of trial prior to verdict. The issue here, and it was the same issue in Tateo, is whether there is a constitutional impropriety if there is no evil intent to avoid an expected acquittal.

that leads to an adjudication of guilt or innocence.

B. New York has fundamentally misunderstood the Double Jeopardy Clause

It is certainly unusual for certiorari to be granted simply to correct an error of a state court. However, even apart from any consideration of the national application of Tateo, New York's misunderstanding cries out for correction. The New York Court of Appeals is a highly respected court, and its views are sure to be influential. The New York Court of Appeals has taken it upon itself to reject precedent of this Court, on which this Court has recently continued to rely. The New York Court of Appeals has supported its conclusion on nothing more than its view of "elemental double jeopardy principles" (Pet. App. 6).

We believe that Tateo was correctly decided, that it should have been controlling here, and that this Court should speak to New York's fundamental misunderstanding of the Double Jeopardy Clause. Tateo does not dilute protections against prosecutorial or judicial conduct that is malevolent, or that is intended to avoid an unfavorable verdict. Indeed, that is what we see as the policy behind this Court's opinion in Oregon v. Kennedy. We believe that the precedent of this Court leads to a bright-line rule that, absent purposeful misconduct malevolently intended to prejudice the defendant's "valued right," there should be no Double Jeopardy bar to further prosecution simply because circumstances provide the defense with a "Hobson's choice" or, in other words, "no choice"

but to seek a mistrial or otherwise terminate the trial before verdict. United States v. Dinitz, 424 U.S. at 610. Nothing in Tateo or in any other precedent of this Court suggests anything different.

The approach of the New York Court of Appeals, however, leads in a strikingly different direction. First, that approach finds "coercion" of a trial termination where there is nothing more than "inadvertent error." Second, it finds governmental intent to be irrelevant to Double Jeopardy Clause analysis where a trial is terminated with defense counsel's acquiesence. At bottom, the New York Court has concluded that the federal Constitution bars further prosecution where a trial is terminated by a counseled defense decision to plead guilty due to an "inadvertent error" of fact.

Such an approach leads to a serious dilution of society's interest in having guilt determined by juries and in having the guilty punished. There is no practical difference between a defendant who pleads guilty due to a judge's factual mistake and a defendant who moves for a mistrial due to a judge's legal error. In both cases, the defendant may view himself or herself with no choice but to abandon the jury that he or she selected and to lose the "valued right to have [the] trial completed by a particular tribunal."

The New York Court of Appeals is a highly respected court in this country. If its faulty understanding of the federal Constitution is allowed to proceed uncorrected, other courts will likely follow. Without doubt, Double Jeopardy jurisprudence has not always traveled in a

straight line. United States v. Di Francesco, 449 U.S. 117 (1980). This new path needs to be averted; it is a path that has properly been rejected. It simply cannot be that the federal Constitution ratifies the conclusion that in the absence of malevolent conduct a counseled defendant who admits his guilt ends up being immunized from criminal prosecution.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court should either (a) summarily vacate the judgment below, hold that United States v. Tateo, 377 U.S. 463 (1964) remains controlling authority and remand for further consideration or (b) direct full briefing and argument on the issues presented in this petition.

Respectfully submitted,

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STATE OF NEW YORK
COURT OF APPEALS

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1 No. 209

In the Matter of Clifford Randall & C.,

Respondent,

v.

Hon. Harold Rothwax, a Justice of the Supreme Court & C.,

Respondent,

and Hon. Robert M. Morgenthau, District Attorney, & C.,

Appellant.

OPINION

Marc Frazier Scholl, for appellant.
Michael Handwerker, for respondent.

BELLACOSA, J.:

The Appellate Division judgment, premised on a federal double jeopardy bar, grants prohibition against further criminal proceedings on an indictment (161

AD2d 70) and should be affirmed. The unusual developments of this case do not lend themselves to neat categorization within double jeopardy parlance or principles.

The seventeen-year-old defendant was tried for attempted murder in the second degree and related offenses. After eight hours of deliberation which included a dinner break, the jury reported to the trial court that it was deadlocked. The court gave a "mild Allen" charge (Allen v. United States, 164 US 492) and the jurors resumed deliberations. The Trial Justice then conveyed to defendant's counsel what he characterized as "reliable" information: that the jury was voting to convict by a 10-to-2 margin. In fact, the opposite was true: the jury was 10-to-2 to

acquit. The misinformation, it was later learned, was reported to the Trial Justice by a court officer who had accompanied the jurors to dinner and concluded, based on observations alone, that they were split ten to convict and two to acquit. The Trial Justice, while cautioning defendant that the information was speculative, nonetheless named the two jurors he believed were leaning towards acquittal. The court suggested that it would be a "long night" and that the parties might wish to talk about a guilty plea.

Defendant conferred with his counsel and parents. His lawyer advised him -- based on the erroneously and improperly conveyed information regarding the still deliberating jury's reported tentative vote -- that the two "acquittal" jurors

could change their vote and convict on the highest count. Counsel advised that it was more likely that the jury would remain deadlocked or would render a compromise verdict. Counsel also advised defendant that if at any time the deliberating jury returned a verdict while he was considering the plea, the plea option and the accompanying potential for a shorter sentence would be lost.

Defendant continued to assert his innocence but believed that he had no chance for an acquittal and that he was facing a lengthy prison sentence. He agreed to plead guilty to the third count, criminal use of a firearm in the first degree, in full satisfaction of the indictment. The Trial Justice refused to accept an Alford plea (North Carolina v.

Alford, 400 US 25), but executed what he termed a "painless allocution" requiring that defendant merely say "Yes" to the court's questions to obtain court approval of the plea bargain. The late night guilty plea was then recorded. After the jury was discharged, the foreperson reported promptly and later provided an affidavit that the jury had actually been leaning 10-to-2 in favor of acquittal. A second juror confirmed this vote status in an affidavit, emphasizing that "[t]he overwhelming sentiment was for acquittal." Defendant immediately moved to withdraw his guilty plea two days after the trial was aborted, at which time the same Trial Justice admitted that defendant and his counsel "may have been misled" by the

court's inaccurate communication. The motion was granted and the plea vacated.

Defendant later moved also to preclude retrial on double jeopardy and due process grounds. The same Trial Justice, in denying this motion, conceded that his communication during the jury's deliberation regarding the tentative vote and been "ill-advised," but explained he had thought the information would be "useful" and "helpful" to the defendant.

These facts and this case are resolved under elemental double jeopardy principles and are not controlled by any particular precedent. Defendant was unquestionably placed in jeopardy by the trial and deliberation of the particular jury which had held his fate in its hands (United States v. Jorn, 400 US 470, 479-480; Green

v. United States, 355 US 184, 188; Wade v. Hunter, 336 US 684, 688). Defendant was constitutionally entitled to that jury's resolution of his guilt or innocence (Wade v. Hunter, supra, at 689; United States v. Jorn, 400 US, supra, at 484-485). Defendant did nothing to set in motion the interruption and termination of that fundamental right (compare, Oregon v. Kennedy, 456 US 667; United States v. Dinitz, 424 US 600). The court, by its own explanation, initiated the termination of the right to a verdict from that particular jury.

The Trial Court's candid acknowledgement of inadvertent error and attempt to rectify the harm done by vacatur of the guilty plea and judgment of conviction on which it was based did not

and could not restore the defendant to the status quo ante. Defendant's right to have the particular deliberating jury resolve his fate was forever lost. The vacatur of a guilty plea in this circumstance is not at all similar to other typical relief sought by and granted to defendants from trial or appellate courts, which permit further proceedings on an indictment (compare, United States v. Ball, 163 US 662; United States v. Dinitz, 424 US 600, supra, at 607-610).

This egregious situation, it must be stressed, does not present a dry, theoretical or academic discourse about double jeopardy principles. This case keys into the most sensitive, highly pressurized moment of a hotly contested trial: a deliberating, tentatively

deadlocked, about-to-be-sequestered-overnight jury, presided over by a highly experienced Justice. The "spontaneous" plea "offer" in these circumstances, delivered with incorrect data about the tentative 10-2 conviction vote of the deliberating jury, when bolstered by the full weight and authority of the court, was an offer that defendant could not seriously refuse. Defendant, deprived of the freedom of will necessary for knowing and voluntary plea, was unquestionably entitled to vacatur of his guilty plea.

The termination of a trial without a defendant's request or consent triggers the double jeopardy bar against reprosecution except in those exceptional cases where "manifest necessity" compelled the termination (Oregon v. Kennedy, 456

US, supra, at 672; Arizona v. Washington, 434 US 497, 509; Illinois v. Somerville, 410 US 458, 463; United States v. Jorn, 400 US, supra, at 481; Gori v. United States, 367 US 364; United States v. Perez, 22 US 579). No one dares claim that this trial was interrupted by a "manifest necessity". Rather, like a court's sua sponte declaration of mistrial, the invalidly induced guilty plea here deprived defendant of his fundamental right to have the particular deliberating jury determine his fate (see, United States v. Jorn, supra, at 484).

United States v. Tateo (377 US 463) does not compel a contrary conclusion. In Tateo, the Supreme Court determined that defendant's guilty plea -- later vacated -- had been coerced by

the Trial Judge's mid-trial threats that if defendant were convicted by the jury he would impose a life sentence (id., at 464). The Supreme Court concluded that the case was controlled by the principles in United States v. Ball (163 US 662, 671-672) and its progeny which permit retrial where defendant prevails on appeal, reasoning in Tateo that "[a] defendant is no less wronged by a jury verdict at all" (377 US, at 467). Subsequent Supreme Court cases cast considerable doubt on the generality of that assertion. What has emerged was the "important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of [judicial or prosecutorial] error" (United States v.

Dinitz 424 US 424 600, 609, supra). Indeed, in United States v. Jorn (400 US 470, supra), the Supreme Court emphasized that "the crucial difference between reprosecution after appeal by the defendant and reprosecution after a sua sponte judicial mistrial declaration is that in the first situation the defendant has not been deprived of [the] option to go to the first jury and, perhaps, end the dispute then and there with an acquittal [whereas, in the second situation] where the judge, acting without the defendant's consent, aborts the proceeding, the defendant has been deprived of [the] 'valued right to have [the] trial completed by a particular tribunal'" (id., at 484). The Supreme Court concluded that Tateo fits into the first category and,

thus, made a distinction between "voluntariness for purposes of assessing the validity of a guilty plea and for purposes of assessing reprosecutability under the Double Jeopardy Clause (400 US, supra, at 484, n 11).

In the case before us, the trial court's inducement of defendant's guilty plea so completely deprived defendant of the option to take his chances with the particular jury that the termination of his trial while the jury was deliberating his fate is the legal equivalent of the situation in Jorn for purposes of assessing reprosecutability under the Double Jeopardy Clause. In both instances, the trial courts eliminated the defendants' fundamental right to have their trials completed by their particular

tribunals (United States v. Jorn, 400 US, supra, at 484; Wade v. Hunter, 336 US, supra, at 689).

Because the guilty plea in this case inextricably and necessarily cut off any chance for defendant to obtain a resolution from that jury, vacatur alone of the guilty plea did not and could not proportionately remediate the violation. The Trial Justice's statements to defendant and his counsel so thoroughly permeated defendant's assessment of his chance for resolution from that jury that he was left bereft of his constitutionally protected option.

An overarching feature of this case is also concern for the integrity of the jury deliberation process. It was adversely affected here, at least perceptually. The

information imparted by the Trial Justice gave the erroneous impression that the confidentiality of the deliberations had in some manner been officially penetrated. Such activity cannot be countenanced (People v. Bouton, 50 N.Y.2d 130).

The Appellate Division correctly concluded that a separate, successive prosecution could not be allowed in the circumstances of this case. We emphasize that we do not, by this decision, intend to engender any disincentive to Trial Justices fulfilling their sworn duty as they see fit -- as the Trial Justice did here in vacating a patently improper guilty plea -- regardless of the eventual and potential constitutional consequences and legal denouement.

Accordingly, the judgment of the Appellate Division should be affirmed, without costs.

Judgment affirmed, without costs. Opinion by Judge Bellacosa. Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone and Hancock concur.

Decided November 21, 1991

ORDER OF APPELLATE DIVISION

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on _____.

Present - Hon. Francis T. Murphy,
Presiding Justice
Joseph P. Sullivan
John Carro
Richard W. Wallach
Israel Rubin,
Justices.

Application of Clifford Randall by his attorney, Michael Handwerker.

Petitioner,
For a judgment pursuant to Article 78 of the CPLR,

-against-

Hon. Harold Rothwax, a Justice of the Supreme Court of the State of New York, presently presiding at a Trial Term, Part 56, Supreme Court, New York County and Hon. Robert M. Morgenthau, District Attorney, New York County,

Respondents.

39398
[M-88]

The above-named petitioner having presented an application to this Court praying for an order, pursuant to Article 78 of the Civil Practice Law and Rules, in the nature of a writ of prohibition, seeking to prohibit respondent justice from conducting any further proceedings in an action entitled People v. Clifford Jackson [sic], and prohibiting respondent Morgenthau from retrying petitioner under Indictment No. 2495/89,

And said proceeding having been argued by Michael Handwerker, of counsel for the petitioner, and by Brian E. Donahue, of counsel for the respondent Morgenthau; and due deliberation having been had thereon, and upon the opinion of this Court filed herein,

It is unanimously ordered that the application be and the same is hereby granted, the respondents prohibited from any further prosecution of the petitioner under Indictment Number 2495/89, and the indictment dismissed, without costs and without disbursements. The matter is remitted to the trial court for the purpose of entering an order in favor of the accused pursuant to CPL 160.50, not less than 30 days after service of this order upon the respondents, with leave during this 30 day period to respondents to move and seek any further stay of the implementation of CPL 160.50 as in the interest of justice is required.

ENTER: _____

OPINION OF APPELLATE DIVISION

SUPREME COURT, APPELLATE DIVISION

First Department, February 1990

Francis T. Murphy, P.J.
Joseph P. Sullivan
John Carro
Richard W. Wallach
Israel Rubin, JJ.

Application of Clifford Randall by his attorney, Michael Handwerker,
Petitioner,

For a judgment pursuant to Article 78 of the CPLR

-against-

Hon. Harold Rothwax, a Justice of the Supreme Court of the State of New York, presently presiding at a Trial Term, Part 56, Supreme Court, New York County and Hon. Robert M. Morgenthau, District Attorney, New York County,
Respondents.

39398

[M-88]

Application by the petitioner seeking an order pursuant to Article 78 of the CPLR in the nature of prohibition prohibiting respondent Justice from conducting any further proceedings in an action entitled People v. Clifford Jackson [sic] and prohibiting respondent Morgenthau from retrying petitioner under Indictment 2495/89.

Michael Handwerker, attorney for petitioner

Brian E. Donahue, of counsel (Robert M. Morgenthau, attorney) as New York County District Attorney.

MURPHY, P.J.:

Petitioner in this proceeding brought pursuant to CPLR Article 78 seeks to prohibit the New York County District Attorney from reprosecuting him upon indictment number 2495/89. He claims that reprosecution will violate his constitutional right not to be twice placed in jeopardy of conviction for the same crime. The unique circumstances

giving rise to petitioner's claim are as follows:

Petitioner was charged in indictment number 2495/89 with attempted murder in the second degree and related crimes. His trial commenced on June 13, 1989 before Justice Rothwax. On June 20, 1989 the case was put to the jury at about 12:00 noon. At about 2:15 the jury received a read back of certain testimony. Thereafter, the members of the jury deliberated until 6:00 p.m. when they were sent for dinner. When the jurors had finished their dinner they resumed deliberating until 7:55 p.m. at which time they sent the court a note indicating that they were deadlocked. The court then gave the jury a mild "Allen" charge and instructed the jurors to continue

deliberating. Either immediately before or after the "Allen" charge, the court addressed the defendant and his counsel in the presence of the prosecutor. He told them that he had "reliable" information that the jury was divided 10 to 2 in favor of conviction. Although the court cautioned that it was not entirely sure of this "reliable" information, he named the two jurors whom he believed were leaning in favor of acquittal. The court expressed the view that it would be a long night and suggested that the parties might want to talk about a plea. Thereafter, the 17-year-old defendant conferred with his attorney. His attorney advised him that there was a possibility that the two jurors for acquittal would be pressured into changing their positions and voting

for conviction on the attempted murder count. Counsel, however, thought it more likely that the jury would either remain deadlocked or would compromise and convict the defendant of the second count in the indictment, assault in the first degree, for which the defendant would probably receive a sentence of 7 1/2 to 15 years. The defendant was advised that the jury might return with a verdict at any time thus foreclosing the possibility of obtaining a more lenient sentence by means of a plea bargain. Believing, on the basis of the information imparted by the court, that there was little or no chance of an acquittal and that a verdict entailing a stiff sentence might be imminent, the defendant, although protesting his innocence, agreed, in full

satisfaction of the indictment, to enter a plea of guilty to the third count, criminal use of a firearm in the first degree, in exchange for a promised sentence of from 4 1/4 to 8 1/2 years. The plea bargain was readily approved by Justice Rothwax who, although unwilling to accept an "Alford" plea, offered the defendant a "painless allocution."

Shortly after the jury had been discharged, it came to light that the jury had, in fact, been leaning 10 to 2 in favor of acquittal. The jury foreperson stated in an affidavit that just after dinner on June 20, 1989 she recorded an informal vote of the jury in which 10 voted to acquit and 2 to convict. A second juror has filed an affidavit confirming the foreperson's and noting

further: "Just prior to our receiving instructions to cease deliberations because we were being discharged, we were meditating and searching our inner selves. The overwhelming sentiment was for acquittal. It is my strong conviction that had the Court allowed us to deliberate another 10 minutes that the defendant would have been acquitted on all charges."

On June 22, 1989 the defendant moved to withdraw his plea claiming that he had been induced to enter a plea based upon improperly conveyed and inaccurate information. Justice Rothwax granted the motion, stating, "I feel as an act of discretion that the motion to withdraw the plea should be granted since it appears to me that the defendant and his Counsel may

have been misled, inadvertent to be sure, but misled by the Court nevertheless."

Following the plea withdrawal, the defendant retained new counsel who, on October 26, 1989, moved to preclude retrial of the defendant on double jeopardy and due process grounds. In his decision denying the motion, Justice Rothwax first noted that he did not dispute defendant's account of what had occurred leading to the termination of the trial. He acknowledged that it had been "ill-advised" for him to discuss the status of the jury's deliberations with the defendant, but stated that he had done so because he thought the information would be "helpful" and "useful" to the defendant. The information respecting the jury's progress, Justice Rothwax

explained, came to him from a court officer. The judge had inquired of the court officer how things had gone at dinner and the court officer in response volunteered that everything had gone well except that the jury seemed split into two fractions - a group of 10 to convict and a group of 2 to acquit. According to Justice Rothwax, the court officer had not spoken to the jurors but had gathered the existence and dimensions of the split from observing the way the jurors sat and interacted during dinner. Justice Rothwax acknowledged that the defendant had relied upon the erroneous information imparted by him in determining to enter his plea, but nevertheless concluded that there existed no basis to sustain the double jeopardy claim.

Upon the denial of his motion, the defendant commenced the within proceeding in which he renews his contention that reprosecution will violate the constitutional injunction against double jeopardy. The People have replied that in the absence of judicial or prosecutorial acts designed to avoid an acquittal reprosecution ought not to be barred.

Our Federal and State constitutions both provide in substance that the government may not place a criminal defendant twice in jeopardy for the same offense (U.S. Const. Amend 5; NY Const Art. 1 §6). The protection, an ancient one deeply rooted in the common law (see e.g., 4 Bl. Comm. 335; Regina v. Tancock, 13 Cox C.C. 217, 220; The King v. Emden, 9 East 437, 445-447), has been thought an

essential check upon the power of the state to intimidate its citizenry (People v. Michael, 48 N.Y.2d 1, 7). It is recognized that the state possesses prosecutorial resources far in excess of those the individual may marshall for his or her defense, and that if the state is permitted to reprosecute an individual without limitation it may achieve through attrition an advantage having nothing to do with the merits of its case (see, Green v. United States, 355 U.S. 184, 187-188). Indeed, a prosecution exacts a tremendous personal, economic and social toll upon a defendant, which, although necessary in the first instance, cannot be lightly permitted anew, for to do so would be to permit a form of punishment not only unsanctioned by, but abusive of, judicial

process (id.). Ordinarily, then, the prosecution gets but one opportunity to prove its case against a criminal defendant. Concomitant with this limitation is the "valued right" of the defendant to have his case completed in one proceeding before the particular jury he has participated in selecting (Wade v. Hunter, 336 U.S. 684, 689).

Notwithstanding the language of the federal and state double jeopardy provisions which literally read would seem to constitute absolute bars to reprosecution, it is by now well-established that a defendant whose judgment of conviction is reversed on appeal may be reprosecuted (see United States v. Ball, 163 US 662), except in those instances where the reversal is

predicated upon evidentiary insufficiency (see Burks v. United States, 437 US 1). The defendant is said to consent to reprosecution when he or she challenges the judgment of conviction. Similarly, the defendant is deemed to consent to reprosecution when he or she moves for or acquiesces in the declaration of a mistrial. In both situations the defendant's request for relief is construed as a request for adjudication in a forum free from prejudicial taint. Where, however, a defendant has not sought to void or avoid a judgment, it is clear that no consent to reprosecution can be inferred.

By entering a guilty plea, of course, the defendant did not seek to avoid a judgment of conviction. To the contrary,

he consented to one being entered against him because he wished conclusively to terminate his jeopardy at that point on terms he believed to be the most favorable he could obtain. Obviously, no consent to reprosecution can be inferred from an action so unequivocally intended to bring the prosecution to a definitive end. The defendant has, however, since moved to withdraw his plea and so to avoid the judgment which would have been entered thereon. What significance is to be attached to this action?

It would seem to us that this would depend upon the circumstances under which the plea was originally entered. If the plea was voluntary and therefore entailed a knowing and intelligent waiver of the defendant's right to have his case decided

by the first impanelled jury, the withdrawal of the plea, permitted as a matter of discretion, would in no way affect the validity of the waiver. Where, however, the plea was coerced and the waiver of the defendant's right to proceed before the first tribunal was therefore vitiated, we can perceive no basis for characterizing the motion to withdraw the plea as a consent to reprosecution. To conclude otherwise would be to say in effect that a defendant may only vindicate one constitutional right - the right not to be convicted upon a coerced plea - at the expense of another constitutional right - the right not to be twice placed in jeopardy. We do not think that any such perverse economy of right may be countenanced, for as Justice Holmes

stated, "[it] cannot be imagined that he law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States" (Kepner v. United States, 195 US 100, 135, [dissenting opinion]; accord Green v. United States, 355 US 184, 192-94).

The question then upon which the determination of this proceeding substantially depends is whether the defendant's plea was in fact coerced and the waiver of his right to have his case decided by the first impanelled jury therefore vitiated.

A review of the record leaves us with no doubt that the defendant's guilt plea was coerced, perhaps inadvertently, but

coerced nonetheless. Realistically, the trial court's inexplicable announcement[1] to the 17-year old defendant that the jury was leaning 10 to 2 in favor of conviction

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[1]It is, of course, very basic that jury deliberations are to be conducted in absolute secrecy and, accordingly, that the status of those deliberations is not to be divulge by anyone, most particularly agents of the court, prior to the announcement of the verdict. As the court of Appeals has stated, "[T[he strong public policy favoring the absolute confidentiality of jury deliberations is not lightly to be disregarded" (People v. Bouton, 50 N.Y.2d 130, 138,; see also CPL 310.10). While we do not conclude on the record before us that there was improper communication between the jury and the court, the possibility cannot be discounted, for we can think of no reason why an experienced trial judge would represent as "reliable" information which was, in reality, wholly speculative. If the sole basis for the judge's announcement was the court officer's observation of the way the jurors sat and interacted at dinner, the characterization of the information given the defendant as "reliable" was, if anything, almost as remarkable as the judge's determination to make any disclosure at all.

left the defendant with no option but rapidly to enter a plea, for based upon what the judge had told him, the defendant quite reasonably believed that he the jury was poised to convict him of one of the indictment's top counts and that it might do so at any time. From the defendant's perspective, the entry of a plea was the only way to avoid spending the remainder of his youth in prison. We cannot conceive that any situated defendant would have acted differently.

Of course, the fact that the defendant perceived his options to be severely limited, would not of itself require the conclusion that the plea was coerced. Guilty pleas are almost always the product of a defendant's understanding that his options are very narrowly circumscribed.

What distinguishes the present plea is that it was prompted by a grossly inaccurate and inappropriate representation which prevented the defendant from any intelligent assessment of his real options. At the heart of the defendant's decision to plead not guilty lay the conviction that the particular jury chosen to hear his case would view his cause favorably. The defendant, who always had the option to enter a plea, remained content, in light of his assessment of the merits of his case, to have his fate decided by that jury and indeed there is every indication that the defendant, satisfied with the way the trial had gone, would have left his case with the jury had the court not led him to believe that his confidence in the jury

was seriously misplaced. What had seemed the defendant's most attractive option now seemed, in view of the court's completely erroneous disclosure, one fraught with prohibitive risks. The defendant then determined to remove his case from the jury based upon a critical misperception of the risks entailed by his original election, a misperception fostered entirely by the trial judge's singularly improvident announcement. We cannot say that a plea entered in such circumstances was intelligently made. We think it clear that a plea induced by materially false information imparted by a trial judge, has been coerced and cannot be permitted to stand and, accordingly, that the vacatur of defendant's plea was required as a

matter of law (see, People v. Jones, 63 A.D.2d 1008).

Having so concluded, it follows that the defendant's motion to withdraw his plea cannot be viewed as a consent to reprosecution. Indeed, the injury the defendant has suffered as a result of the trial court's highly improvident disclosure is not one which a new trial might cure. The defendant does not claim that his cause was prejudiced by the manner in which his trial was conducted. He does not claim that evidentiary errors or an erroneous charge set the jury inalterably against him so that his fate can now be fairly determined only by a new factfinder. His claim is quite the opposite. He maintains that he was sufficiently satisfied with the way his

trial had gone to leave the case with the jury and that he would have done so had the judge's grossly inaccurate and improper announcement respecting the jury's disposition to convict not induced him to enter a plea. The defendant then does not seek a new chance for acquittal; if he could he would have his old chance of acquittal - which by all accounts was excellent - back. But as that chance has been irretrievably lost through no fault of his own, the defendant merely seeks to assert his right under the constitution to avoid further jeopardy. As we can perceive no point at which that right may be fairly said to have been relinquished by the defendant, we believe that the within petition must be granted.

In reaching this conclusion it is important to note that there are circumstances in which a defendant may be retried notwithstanding his lack of consent to the premature termination of his first trial. Retrial in the absence of consent by the defendant to the prior termination is, however, sharply limited to those cases in which the termination of the first proceeding was dictated by manifest necessity (United States v. Perez, 9 Wheat. 579). We can conceive of no case in which it would be manifestly necessary for a trial judge to coerce a guilty plea from a defendant. Far from being necessary, such conduct is clearly contrary to the ends of public justice.

We are, of course, aware that in United States v. Tateo, 377 US 463, the

Supreme Court upon facts in many respects similar to those at bar, held that reprosecution was not foreclosed by the double jeopardy clause of the United States Constitution. In Tateo, a guilty plea was obtained on the fourth day of trial after the trial court threatened that, if the defendant persisted in exercising his option to proceed with his trial, and was convicted, he would be sentenced to life imprisonment without possibility of parole. The defendant's plea was subsequently set aside by Judge Weinfeld who found it to have been coerced. Thereafter, reprosecution was barred by Judge Tyler on the ground that neither constitutionally sound consent nor an exception circumstance supported the termination of the first trial. A divided

Supreme Court reversed, holding, in essence, that in the absence of any intimation that the plea had been coerced to avoid a verdict of acquittal, the coercion of the plea was no different from any other error warranting reversal on appeal. The Court stated, "[I]t would be high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction" (id. at 466).

Respectfully, however, we do not think that the coercion of a guilty plea by a trial judge after jeopardy has attached can be considered just "any defect sufficient to constitute reversible error." In contrast to other kinds of

trial errors which, even if prejudicial, leave the defendant with the option of continuing the trial in order to obtain a verdict of acquittal, the coercion of a guilty plea by the trial judge completely abrogates that option, and so, defeats the valued right of the defendant to obtain a verdict in one proceeding from the first impanelled jury. It is precisely this right that the double jeopardy clause is intended to safeguard and we know of no constitutionally founded principle which would deny a defendant its protection in the circumstances here presented. While we recognize the strong societal interest in seeing the guilty punished, and understand the tension between that interest and the constitution's unqualified injunction against double

jeopardy, we think that the interests of society are sufficiently protected by the rule enunciated in Ball, 163 US 662, supra. The vindication of society's legitimate interest does not, in or view, require the further limitation of constitutional rights apparently sanctioned in Tateo and which the People propose here.

In any event, we think it difficult to square Tateo with prior decisions of the Supreme Court such as Downum v. United States, 372 US 734 and Green v. United States, 355 184, which decisions Tateo does not purport to disturb. Nor do we find it easy to reconcile Tateo with subsequent Supreme Court doctrine indicating that "the important consideration, for purposes of the Double

Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of [judicial or prosecutorial] error" (United States v. Dinitz, 424 US 600, 608); for, manifestly, where a plea has been coerced, and particularly where, as here, it has been coerced by highly material factual misrepresentations, the defendant has been deprived of all control over the course to be followed.

The difficulty with the holding in Tateo is nowhere brought into sharper focus than in United States v. Jorn, 400 US 470. In Jorn, Justice Harlan, who had also authored Tateo, observed much as we have here:

> the crucial difference between reprosecution after appeal by the defendant and reprosecution after a sua sponte judicial mistrial

> declaration is that in the first situation the defendant has not been deprived of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal. On the other hand, where the judge, acting without the defendant's consent, aborts the proceeding, the defendant has been deprived of his "valued right to have his trial completed by a particular tribunal."

(Id. at 484 [emphasis added]). Recognizing the very apparent conflict between this unexceptionable acknowledgement of the defendant's very substantial interest in retaining the option to have his case decided by the first tribunal, and the statement in Tateo that "[A] defendant is no less wronged by a jury finding of guilt after an unfair trial than by a failure to get a jury verdict at all" (Tateo, supra at 467),

Justice Harlan attempted to harmonize his views as follows:

> even though defendant's guilty plea [in Tateo] which aborted the trial was subsequently held to have been coerced by judicial action, the defendant nonetheless was not foreclosed of his option to go to the jury if he chose to do so, and thereafter rely on post-conviction proceedings to redress the wrong done to him by the judge. In other words, the question of "voluntariness" for purposes of assessing the validity of a plea of guilty -- whether offered before or at trial -- must be distinguished from the question of "voluntariness" for purposes of assessing reprosecutability under the Double Jeopardy Clause.

(Jorn, supra at 484, n11.) That this is not a tenable distinction seems to us clear. The entry of a plea of guilty and loss of the right to proceed before the first jury, are inextricably bound together. If the plea has not been voluntary, we are completely at a loss to

understand how the defendant may be said to have still retained some meaningful option to go to the jury.

Assuming, however, that the distinction is more than merely semantic, and that there are situations in which a defendant coerced to end his trial with a plea can nevertheless be said to have retained his option to proceed, and assuming further that Tateo was such a case, we think that the facts at bar present a situation in which the option to proceed was so thoroughly eclipsed as to make the termination of the trial involuntary, even "for purposes of assessing reprosecutability under the Double Jeopardy Clause."

Although the trial judge's threat in Tateo was highly coercive, it could not

have affected Tateo's assessment of his chances for acquittal. In a sense then Tateo's option to go to the jury may be said to have survived the judge's threat, for while the consequences of a conviction were made to seem severe indeed, the defendant, arguably, might still have chosen to submit his case to the jury had he had sufficient confidence in its merits. By contrast, in the matter at bar, the judge's misrepresentation led the defendant to believe that he could no longer trust the jury with his fate no matter how convinced he was of his innocence and the merits of his defense. If the option to go to the jury has any value, it is because the jury has the power to acquit. When a trial judge by patently improper announcement of the

jury's leanings leads a defendant to believe that a jury will exercise its power to convict rather than acquit, he cannot but destroy whatever value the jury option possesses for the defendant. That is precisely what occurred in the matter at bar. That a defendant's option to go to the jury should be vitiated in such a fashion would be disturbing in any case, but it is particularly so here where the value of the voided option was apparently very substantial.

In view of our factual determination that the defendant was completely deprived of his option to go to the jury, we find no merit to the People's argument that the success of the defendant's double jeopardy claim depends on whether there was some governmental design to provoke the plea so

as to avoid a verdict of acquittal. The cases in which the intent of either the judge or prosecutor becomes relevant to the disposition of double jeopardy claims are, without exception, cases in which the defendant has been left with some option to go forward with his trial. Most typically, these are situations in which a mistrial has been declared on the defendant's motion as a result of either judicial or prosecutorial error. It is recognized that, in such circumstances, although the defendant is left with a most unhappy choice, the choice of whether to proceed is still his; cognizant of the error which has been made and its probable impact on his chances with the jury, the defendant may intelligently elect either to continue his trial or to seek to abort

the tainted proceeding in order to obtain a fresh chance for acquittal -- one which may be afforded without the delay necessitated by intervening appellate proceedings. The existence of this option, while hardly optimal for the defendant, has been held sufficient to defeat most double jeopardy claims (United States v. Dinitz, 424 US 600, 606-609). The reason for this is fundamentally that the social price of barring reprosecution in all cases where government error or even overreaching has provoked the defendant to move successfully for a mistrial would be too high. It is, however, clear that there is a point at which there must be some effective sanction for governmental overreaching resulting in multiple prosecutions. The

line, at least on the federal level, has been drawn at governmental actions specifically intended to goad the defendant into requesting a mistrial declaration (Oregon v. Kennedy, 456 US 667, 675-676). But the focus on the prosecutor's or judge's intent is relevant only in situations where some option remains with the defendant and he may therefore be said to have in some sense consented to the termination of his trial. Where, as here, the defendant is so thoroughly deprived of any basis for reasonably assessing his chances with the jury that his option has, by any realistic measure, been entirely extinguished, the situation is not so much akin to that presented by a mistrial declared on the defendant's motion, as it is to a mistrial

declared by the court on its own initiative. And, as noted, when a mistrial is declared, sua sponte, by the court the single relevant inquiry has nothing to do with judicial or prosecutorial intent but is concerned solely with whether the court's determination to end the trial was manifestly necessary. As we have already had occasion to observe, there was nothing even remotely necessary about the judicial conduct which caused the termination of the defendant's trial.

While we think, in view of the preceding discussion, that the matter at bar is distinguishable from Tateo, we are left with the most serious doubts as to whether the availability of a constitutional right as fundamental as the

right not to be twice tried for the same offense, ought to depend upon the sort of distinctions made relevant by Tateo. We would have thought that once it had been factually determined, as it was in Tateo, that a defendant had been "enveloped by a coercive force . . . which, under all the circumstances, foreclosed a reasoned choice by him at the time he entered his plea (United States v. Tateo, 214 F. Supp. 560, 568 [Weinfeld, J.]), there would be no possibility of sensibly concluding that the surrender of the right to go to the first jury had been voluntary. Thus, even if it were not possible to distinguish Tateo, as we have, we would still determine to bar reprosecution of the defendant, premising our ruling upon the

independent protections against double jeopardy found in our state constitution.

Accordingly, the petition should be granted, the respondents prohibited from any further prosecution of the petitioner under indictment number 2495/89 and the indictment dismissed, without costs.

All concur.

Order filed.